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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

29 UNITED STATES OF AMERICA,) CR 16-00411 VC
30 Plaintiff,) UNITED STATES' OPPOSITION TO
31 v.) DEFENDANT NAUM MORGOVSKY'S MOTION
32 NAUM MORGOVSKY and) "MOTION TO COMPEL THE GOVERNMENT TO
33 IRINA MORGOVSKY,) AFFIRM OR DENY USE OF UNLAWFUL
34 Defendants.) ELECTRONIC, MECHANICAL OR OTHER
35) SURVEILLANCE" (ECF NO. 210)
36) Pretrial Conference: May 30, 2018
37) Time: 1:30 p.m.
38) Honorable Vince Chhabria
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41 The United States opposes defendant Naum Morgovsky's ("defendant") Motion to Compel the
42 government to "affirm or deny use of unlawful electronic, mechanical or other surveillance" (ECF No.
43 210). In an attempt to cast himself as a general enemy of the federal government and the subject of a

1 malicious prosecution, Mr. Morgovsky has made a bald claim, without producing a single fact or sworn
 2 statement in support, that he believes that “it was entirely probable that the Government at some point”
 3 surveilled him electronically. *Id.*, p. 2. Based on this naked suspicion, Mr. Morgovsky asks the Court to
 4 issue an order to the government to confirm or deny whether illegal surveillance was conducted. It need
 5 not do so, as the government simply denies Mr. Morgovsky’s claim.

6 As an initial matter, Mr. Morgovsky utterly fails to meet his burden with respect to 18 U.S.C. §
 7 3504. The relevant part of the statue is as follows:

8 In any trial, hearing, or other proceeding in or before any court, grand jury, department,
 9 officer, agency, regulatory body, or other authority of the United States (1) upon a claim
 10 by a party aggrieved that evidence is inadmissible because it is the primary product of an
 11 unlawful act or because it was obtained by the exploitation of an unlawful act, the
 12 opponent of the claim shall affirm or deny the occurrence of the unlawful act.

13 The Ninth Circuit Court of Appeals, like other courts, has made clear the important role of the district
 14 court in balancing the limited right to disclosure of electronic surveillance, if any, against the sensitivity
 15 of disclosing such information. *See, e.g., United States v. Wylie*, 625 F.2d 1371, 1376 (9th Cir. 1980)
 16 (“the task of striking a balance between ‘the conflicting and sensitive interests at state’ when this type of
 17 question arises ‘properly lies with the district court’”); *see also United States v. See*, 505 F.2d 845, 856
 18 (9th Cir. 1974) (same). “[B]ecause responding to ill-founded claims of electronic surveillance would
 19 place an awesome burden on the government, a claim of government electronic surveillance of a party
 20 must be sufficiently concrete and specific’ before the government must respond” *United States v.*
 21 *Waters*, 627 F.3d 345, 364 (9th Cir. 2010) (quoting *United States v. Tobias*, 836 F.2d 449, 452-53 (9th
 22 Cir. 1988) (quoting *United States v. Alter*, 482 F.2d 1016, 1026-27 (9th Cir. 1973)). When responding,
 23 “the specificity required of the government’s response is measured by the specificity and the strength of
 24 the witness’ allegations.” *In re Grand Jury Investigation*, 437 F.3d 855, 857 (9th Cir. 2006).

25 Notwithstanding the government’s denial, the Court should not entertain Mr. Morgovsky’s
 26 motion until he provides an unequivocal statement that he has been illegally surveilled and a basis upon
 27 which the Court could so conclude. Mr. Morgovsky’s claims are so non-specific and unsubstantiated as
 28 to amount to a fishing expedition and requires no response. “While a mere assertion of illegal
 wiretapping unsupported by evidence may suffice [to invoke Section 3504], it must be a positive

1 statement that unlawful surveillance did in fact take place.” *United States v. Nabors*, 707 F.2d 1294,
 2 1301-02 (11th Cir. 1983), *cert. denied*, 465 U.S. 1021, 104 S.Ct. 1271, 79 L.Ed.2d 677 (1984). Mr.
 3 Morgovsky does not allege that any of the government’s evidence is the result of an illegal act, rather, he
 4 muses that he could have been wiretapped (he does not specify whether legally or illegally) and
 5 therefore demands an admission from the government. He asserts that “[d]evelopments since January
 6 2017 have not reduced our concern that Mr. Morgovsky has likely been overheard on intercepted
 7 conversations.” Motion, ECF No. 210, p. 3. He goes on to posit that others around him may even have
 8 been surveilled. *Id.*; *see United States v. Gardner*, 611 F.2d 770, 774 (9th Cir. 1980) (where claimant
 9 made general allegations lacking substantial support, government’s denial is sufficient and firsthand
 10 inspection of FBI records by the government is not required); *see also United States v. Vielguth*, 502
 11 F.2d 1257, 1260 (9th Cir. 1974) (general conclusive denial may be a sufficient response to a general
 12 claim under Section 3504). Failing to make any unequivocal statement that evidence is the product of
 13 unlawful surveillance, Mr. Morgovsky’s motion should be denied for failing to meet any burden of
 14 persuasion to go forward.

15 Further, even assuming evidence was illegally gathered (and it was not), the government has not
 16 and does not intend to use any assumed surveillance material as “evidence,” and therefore Section 3504
 17 is inapplicable. The government obtained search warrants for several email accounts and physical
 18 locations in this matter, which were litigated during late 2017. Other evidence comes by way of grand
 19 jury subpoena, such as bank records, night-vision purchases, and shipping records. The defendant was
 20 charged because he was committing crimes related to the unlawful export of technology, and not
 21 because, as he wants the Court to believe, the government is pursuing him because of his association
 22 with Russia. Mr. Morgovsky has simply not met his burden that there was an illegal surveillance act of
 23 any kind or that any of the government’s evidence resulted from it.

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2 The government has disclosed or made available for inspection all statements of the defendant in
3 its possession, whether relevant to Counts 9 through 11 or not. No evidence is the result of an illegal
4 surveillance of either defendant. Defendant's Motion should be summarily denied.
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6 DATED: May 16, 2018

Respectfully submitted,

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